COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NO. 20234

KENNETH RAY WILLIAMS, BY AND THROUGH SHEILA ANN O'CONNOR AND GEORGE M. MOOD, AS GUARDIANS AD LITEM,

APPELLANT

VS.

KENNETH RAY LUCKEY,

APPELLEE

FROM A DISTRICT COURT

OF DALLAS COUNTY, TEXAS

BEFORE JUSTICES ROBERTSON, CARVER AND HUMPHREYS
OPINION BY JUSTICE ROBERTSON
MARCH 26, 1980

Kenneth Ray Williams appeals from the trial court's action in holding that his cause of action to establish paternity was barred by the statute of limitations, TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1980), and in dismissing the suit.[1]

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[1] This was originally a suit to establish paternity and liability for support instituted by the Texas Department of Human Resources under an assignment of support rights executed by Williams' mother. The child intervened by and through his guardians ad litem and is the only party appealing the trial court's judgment.

We hold that section 13.01 is not subject to any tolling provisions and that it is not unconstitutional as a denial to

illegitimate children of equal protection or due process. Accordingly, we affirm.

Kenneth Ray Williams was born on August 21, 1977, and this suit was filed on October 25, 1978. Section 13.01 of the Texas Family Code reads as follows:

> A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

Appellant contends that this section is subject to the same tolling provisions as all other Texas statutes, see TEX. REV. CIV. STAT. ANN. art. 5535 (Vernon Supp. 1980),[2] and therefore,

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[2]This article provides as follows:

> If a person entitled to bring any action mentioned in this subdivision of this title be at the time the cause of action accrues either a minor, a married person under twenty-one years of age, a person imprisoned or a person of unsound mind, the time of such disability shall not be deemed a portion of the time limited for the commencement of the action and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title. [Emphasis added].

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that an action to establish paternity brought in a child's right is tolled during its minority. Appellee counters that the language of article 5535 is self-limiting and does not apply to section 13.01 of the Texas Family Code.

We agree with appellee. The language of article 5535 specifically limits its effect to "any action mentioned in this subdivision of this title," and since the Texas Family Code is not in that subdivision, the tolling provisions do not apply to it. Further, no provisions exist within the Texas Family Code for tolling section 13.01. Cf. Texas Department of Human Resources v. Delley, 581 S.W.2d 519, 521 (Tex. Civ. App. - Dallas 1979, no writ) (four year limitation, TEX REV. CIV. STAT. ANN. art. 5529 (Vernon 1958), on paternity suits concerning children born prior to enactment of section 13.01, tolled by general disability statute, id. art. 5535 (Vernon Supp. 1980)).

Further, principles of statutory construction would favor our holding that section 13.01 is not tolled. The dominant consideration in determining the meaning of a statute is the intent of the legislature in enacting the provision. The language of the statute itself is the primary evidence of intent. Jones v. Del Andersen & Associates, 539 S.W.2d 348, 350 (Tex. 1976). The language in section 13.01 evidences an intent that this limitation apply to any suit to prove paternity regardless of who brings it. Moreover, we must presume that the legislature was aware of the scope of existing tolling provisions at the time that it enacted section 13.01, and understood that no such provisions would apply to it. Allen Sales & Servicenter, Inc. v. Ryan, 525 S.W.2d 863, 866 (Tex. 1975). While we may not agree with the policy considerations given effect in certain statutes, our function is not

to question the wisdom of the legislative enactment, but, absent constitutional infirmities, to apply the statute as written.' Jones v. Del Andersen & Associates, 539 S.W.2d at 351. Accordingly, we hold that section 13.01 is not tolled as to appellant's cause of action to establish paternity.

Appellant next contends that the trial court erred in failing to find that illegitimate children have a nonstatutory right to support in Texas. Appellant apparently requested this finding in an attempt to establish a cause of action to which section 13.01 would not apply. Regardless of how the trial court ruled on this request, however, section 13.01 barred appellant's suit for paternity, which was a necessary prerequisite to his action for support against appellee. Thus, any error which may have occurred in the trial court's failure to find as appellant requested was harmless.

Finally, appellant challenges section 13.01 as being unconstitutional because it denies illegitimate children equal protection and due process. Appellant recognizes that this court has previously found section 13.01 to be constitutional in the face of these same challenges. See Texas Department of Human Resources v. Chapman, 570 S.W.2d 46 (Tex. Civ. App. - Dallas 1978, writ ref'd n.r.e.). Nevertheless, he requests that we consider our holding therein, and overrule it or limit its application to suits brought by someone other than the child. While the paternity suit in Chapman was instituted under an assignment of right from the mother, the opinion did not turn

on who brought the suit; rather, the analysis was based on whether the illegitimate child's constitutional rights had been violated. That is precisely the question before us in this action. Appellant has urged no arguments not presented to us by the parties in Chapman, and has cited no new authority which persuades us that our prior decision was erroneous. Based on the fact situation presently before us, as well as that before us in Chapman, we are compelled to hold that section 13.01 does not deny illegitimate children equal protection or due process of the law.

Accordingly, we affirm the trial court's judgment.

TED Z. ROBERTSON
ASSOCIATE JUSTICE

JUDGMENT

COURT OF CIVIL APPEALS

FIFTH JUDICIAL DISTRICT

DALLAS COUNTY, TEXAS

NO. 20234

Kenneth Ray Williams, By and Through Sheila Ann O'Connor and George M. Mood, as Guardians Ad Litem	§	From a District Court
vs.	§	Of Dallas County, Texas
Kenneth Ray Luckey	§	Wednesday, March 26, 1980

BEFORE JUSTICES ROBERTSON, CARVER AND HUMPHREYS
OPINION BY JUSTICE ROBERTSON

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; in as much as appellant, Kenneth Ray Williams, By and Through Sheila Ann O'Connor and George M. Mood, as Guardians Ad Litem, are not required by statute to post an appeal bond, no costs are accesed against said appellant, this decision is hereby certified to the Court below for observance.

CLERK'S OFFICE - SUPREME COURT

Austin, Texas Sept. 10, 1980

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of WILLIAMS v. LUCKY, No. B-9511

was this day refused. No reversible error.

Very truly yours,
CARSON R. JACKSON, Clerk

APPENDIX "B"

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NO. 19558

TEXAS DEPARTMENT OF HUMAN RESOURCES,
APPELLANT

VS.

RICKY L. CHAPMAN,
APPELLEE

FROM A DISTRICT COURT

OF DALLAS COUNTY, TEXAS

The Texas Department of Human Resources sued Ricky L. Chapman under the provisions of Section 13.01 et seq. of the Texas Family Code to establish a parent-child relationship between Chapman and an illegitimate child. The department brought the action under an assignment from the child's mother. Chapman filed a plea in bar asserting that the suit was barred by the statute of limitations set forth in Section 13.01 of the Texas Family Code, which provides that a suit to establish the parent-child relationship between an illegitimate child and the alleged natural parent must be brought within one year from the birth of the child. The trial court sustained the plea and dismissed the cause. We affirm.

The initial question on this appeal is whether the one-year statute of limitations set forth in Section 13.01 of the Family Code[1] invidiously discriminates between illegitimate children so as to deny them equal protection of the law. If we conclude that it does not, we must then decide whether the statute denies illegitimate children due process of law.[2]

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[1] Section 13.01 provides:

A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

APPENDIX "C"

[2]Since the child was born in January, 1974, and this suit was not filed until February, 1977, it is undisputed that Section 13.01, if constitutional, bars the present action.

Equal Protection

The Department first argues that Section 13.01 invidiously discriminates against illegitimates and thereby denies them equal protection of the law. Before deciding this question, we must first determine the applicable standard of constitutional review. Although the Department urges that classifications based on illegitimacy are "suspect" and must be subjected to "strict scrutiny," we cannot apply that standard. In Mathews v. Lucas, 427 U.S. 495 (1976), the United States Supreme Court rejected the argument that illegitimacy is a "suspect" classification. According to the court, such classifications are "in the realm of less than strict scrutiny." Thus, the pertinent analytical approach is whether the statute bears a rational relationship to a legitimate governmental interest. Mathews v. Lucas, supra, at 505-510.

With the proper perspective established, we next consider the case of Gomez v. Perez, 409 U.S. 535 (1973), which forms the foundation of the Department's constitutional attack. In Gomez, the supreme court invalidated a Texas statute which granted support rights to legitimate children but denied that right to illegitimates. The court concluded that the statute violated the constitutional guarantee of equal protection, stating:

> [O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. (409 U.S. at 538)

As this language indicates, a state may not absolutely foreclose the right of an illegitimate child to receive support from the natural father. Indeed, the court recognized the narrowness of its holding in Gomez by stating:

> We recognize the lurking problems with respect to proof of paternity. Those problems are not to be brushed lightly aside, but neither can they be made into

an impenetrable barrier that works to shield otherwise invidious discrimination. (409 U.S. at 536)[Emphasis added]

In the present case, however, the challenged statute is not an "impenetrable barrier" to an illegitimate child's right to support. The statute does not prohibit a suit for support; rather, the statute simply sets forth a time period within which the suit must be brought. As a matter of constitutional law, statutes of limitations relate to remedies, and do not destroy fundamental rights. Cathey v. Weaver, 193 S.W. 490 (Tex. Civ. App. - Austin 1917), aff'd 242 S.W. 447 (1917); Lucia v. United States, 474 F.2d 565 (5th Cir. 1973). Accordingly, we conclude that the present case is not controlled by Gomez, and that our ultimate decision must be based upon whether this limitation on the remedy afforded an illegitimate child is constitutionally deficient.

It cannot be denied that proof of paternity places a burden upon illegitimates which is not shared by legitimate children; however, such a proof requirement is an unavoidable and indispensible element of the child's claim for support. See KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 82 (1971); note, Illegitimacy and Equal Protection, 49 N.Y.U.L. REV. 479, 511 (1974). Legitimate and illegitimate children are not similarly situated classes. Illegitimate children are fundamentally different from legitimate offspring, for at birth, they have no legal relationship to their natural father. Therefore, it is not only reasonable but essential that the state require proof of paternity as a condition of asserting an otherwise equal support right. Cessna v. Montgomery, 63 Ill.2d 71, 344 N.E.2d 447 (1976); Krupke v. Witkowski, 256 N.W.2d 217 (Iowa 1977). The question presented here is whether a requirement that this proof be made within one year from the birth of the child is reasonably related to a legitimate state interest. We conclude that it is. No supreme court case has held that illegitimates must be given an unrestricted right throughout their minority to bring a paternity suit. The state has a legitimate interest in preventing the litigation of stale or fraudulent claims. The purpose of statutes of limitation is to compel exercise of rights within a reasonable

time, so as to afford the opposing party a fair opportunity to defend while the evidence is readily available. Price v. Anderson Estate, 522 S.W.2d 690 (Tex. 1975); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967). It may be that the legislature has concluded that the longer the period between birth and suit, the greater the danger of fraud. At the very least, the defendant's problems of proof are substantially increased with the passage of time. It has long been held that the legislature, not the courts, is entrusted with the responsibility of considering the public interest of this state regarding limitation of actions. See Williams v. Reed, 160 S.W.2d 316 (Tex. Civ. App. - San Antonio 1942, writ ref'd); Bean v. J. I. Case Threshing Machine Co., 221 S.W. 634 (Tex. Civ. App. - Amarillo 1920, writ ref'd). With respect to paternity actions, the legislative discretion is not subject to judicial review unless the prescribed period is so short as to be tantamount to the "impenetrable barrier" proscribed in Gomez. See Cessna v. Montgomery, supra; Krupke v. Witkowski, supra. A one-year limitation is not insurmountably brief, and although the forfeited right is important, this court is not empowered to invalidate legislative enactments based on our own policy concepts of what a reasonable time would be.

In view of the legitimate state interest in precluding the litigation of stale or fraudulent claims, and the fundamental differences between proving paternity of legitimate and illegitimate children, we conclude that Section 13.01 does not deny illegitimate children equal protection of the law.[3]

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[3] We do not consider whether the various tolling provisions set forth in the Texas Revised Civil Statutes are applicable to extend the period within which a paternity suit may be filed.

Due Process

The Department next contends that Section 13.01 is constitutionally deficient in that it denies illegitimate children due process of law guaranteed under the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the

Texas Constitution. It asserts that the illegitimate child's rights to paternity determination and support are impermissibly tied to the willingness and ability of the mother to assert those rights within the prescribed time. According to the Department, the interests of the mother do not always coincide with that of the child, for she may choose not to sue for fear of publicity or in consideration of her continued affection for the child's father. The failure to provide for alternate representation is challenged, and numerous statistics are presented to demonstrate the hardship this provision visits upon the poor, who cannot easily afford paternity suits. However meritorious these considerations may be as matters of policy, they do not rise to the level of constitutional argument. In our judgment, the legislature could reasonably conclude that the support right of an illegitimate child is best protected by requiring the suit to be brought by the mother, and that the potential harm to putative fathers defending stale or fraudulent claims is, on balance, greater than the potential harm to illegitimate children whose support right is forfeited by the mother's inaction. In re People in Interest of L. B., 179 Colo. 11, 498 P.2d 1157 (1972), cert. denied, 410 U.S. 976 (1973); Krupke v. Witkowski, supra; Cessna v. Montgomery, supra. Accordingly, we hold that Section 13.01 does not deny illegitimate children due process of law under the Fourteenth Amendment or the Texas Constitution.

The Department's final argument is that Section 13.01 violates the due process clause of the Fifth Amendment to the United States Constitution by treating subclasses of illegitimates differently. It asserts that while the statute allows illegitimates who are legitimized within one year of birth to recover support, it denies that right to those who are not timely legitimized. In support of this argument, the Department cites Jimenez v. Weinberger, 417 U.S. 628 (1974), which holds that to "conclusively deny" one subclass benefits available to another violates the due process clause of the Fifth Amendment. We cannot accept this contention, for the present statute does not "conclusively deny" any illegitimate child the right to support;

rather, the statute merely sets forth a time period within which the right to support must be asserted. The right to support is thus preserved for all illegitimates, provided, of course, that the paternity suit is filed within the prescribed period. Such a procedural prescription is not a denial of due process, but rather a statutory scheme which, if adhered to, provides due process to all illegitimate children. Therefore, we conclude that Section 13.01 does not violate the due process clause of the Fifth Amendment.

Affirmed.

TED Z. ROBERTSON
ASSOCIATE JUSTICE

DELIVERED:
June 28, 1978

GUITTARD, C. J. NOT PARTICIPATING

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

NO. 80-5861

RECEIVED
DEC 9 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

KENNETH RAY WILLIAMS)
Petitioner,)
)
vs.)
)
KENNETH RAY LUCKEY,)
Respondent)
)

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Kenneth Ray Williams, petitioner herein, respectfully applies for permission to proceed in forma pauperis in connection with the petition for writ of ceriorari to the United States Supreme Court previously filed by petitioner. The affidavit of petitioner's guardian ad litem in support hereof is attached hereto.

This the 8th day of December, 1980, Dallas, Dallas County, Texas.

RESPECTFULLY SUBMITTED:

DALLAS LEGAL SERVICES FOUNDATION, INC.
810 Main Street, Suite 320
Dallas, Texas 75202

(214) 742-1631

By: Lawrence L. Mealer
LAWRENCE L. MEALER
ATTORNEY AT LAW

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

NO. 80-5361

KENNETH RAY WILLIAMS,
Petitioner,

vs.

KENNETH RAY LUCKEY,
Respondent

AFFIDAVIT OF SHEILA ANN O'CONNOR

IN SUPPORT OF

PETITIONER'S APPLICATION TO PROCEED IN FORMA PAUPERIS

STATE OF TEXAS X
X
COUNTY OF DALLAS X

I, SHEILA ANN O'CONNOR, being first duly sworn according to law, depose and say in support of the application of KENNETH RAY WILLIAMS for leave to proceed without prepayment of costs or fees, as follows:

1. I am an attorney licensed to practice law in the State of Texas;

2. By order of the 255th Judicial District Court of Dallas County, Texas of January 31, 1980, I was appointed Guardian Ad Litem to represent in this suit the interests of KENNETH RAY WILLIAMS, an illegitimate child born August 21, 1977.

3. I am familiar with the economic circumstances of KENNETH RAY WILLIAMS and those of this mother, OLLIE RUTH WILLIAMS;

4. Because of the poverty of KENNETH RAY WILLIAMS and his mother, they are financially unable to pay the fees and costs of this cause;

5. Similarly, because of the poverty of KENNETH RAY WILLIAMS and his mother, they are unable to give security for the same, or pay for the costs of printing any briefs.

FURTHER AFFIANT SAITH NOT:

Signed this 4th day of December, 1980.

SHEILA ANN O'CONNOR
GUARDIAN AD LITEM FOR KENNETH RAY WILLIAMS

STATE OF TEXAS X
X
COUNTY OF DALLAS X

Sworn to and subscribed before me by SHEILA ANN O'CONNOR on this the 4th day of December, 1980.

NOTARY PUBLIC IN AND FOR DALLAS, COUNTY, TEXAS

My commission expires: December 31, 1980